

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

)	Case No. 12-1586 SC
)	
MARKUS WILSON and DOUG CAMPEN,)	ORDER DENYING MOTION TO EXTEND
individually and on behalf of)	<u>DISCOVERY DEADLINE</u>
all others similarly situated,)	
)	
Plaintiffs,)	
)	
v.)	
)	
FRITO-LAY NORTH AMERICA, INC.,)	
)	
Defendant.)	
)	
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)	

Now before the Court is Plaintiffs' motion to extend the fact discovery deadline in this food-labelling case. Specifically, Plaintiffs seek an extension of the February 13, 2015 stipulated fact discovery cutoff to allow for the deposition of a third-party marketing agency Luntz Global, LLC and Dr. Frank Luntz (collectively, "Luntz witnesses"). ECF No. 112 ("Mot."); see also ECF No. 105 ("Stip.") (setting February 13, 2015 as the fact discovery cut-off). The Luntz witnesses are relevant to Plaintiffs' case because they provided research to Defendant Frito-Lay regarding the value of the "natural" claim on certain snack food labels at issue in this case.

Frito-Lay opposes extending the deadline, arguing that

1 Plaintiffs have not complied with the local rules in seeking the
2 extension of time and, in any event, cannot show they diligently
3 pursued the discovery at issue. ECF No. 113 ("Opp'n"). Plaintiffs
4 filed an unauthorized reply brief. ECF No. 114 ("Reply"); see Civ.
5 L.R. 6-3(d) (granting the Court, not the parties, discretion to
6 determine if additional briefing is necessary after a motion for
7 extension of time and opposition are filed). The motion is ripe
8 for disposition under Civil Local Rule 6-3(d), and for the reasons
9 set forth below, it is DENIED.

10 Dr. Luntz was first identified as a third party who might have
11 relevant information on July 1, 2014. Two months later, in
12 September 2014, Plaintiffs subpoenaed (and Luntz produced)
13 documents. More than three months later, in January 2015,
14 Plaintiffs served notices of deposition and subpoenas on the Luntz
15 witnesses for depositions to take place on the last two days of
16 fact discovery, February 12 and 13, 2015. After receiving the
17 notices of deposition, Plaintiffs' counsel conferred with counsel
18 for the Luntz witnesses, who informed Plaintiffs the Luntz
19 witnesses were unavailable for a deposition on those dates. At the
20 same time, the parties were preparing for a Rule 30(b)(6)
21 deposition of Frito-Lay's designee regarding marketing, set to take
22 place on February 10, 2015. In light of that deposition, which the
23 parties agreed might obviate the need for a deposition of the Luntz
24 witnesses, and the scheduling issues with the Luntz witnesses,
25 Plaintiffs suggested a stipulation. ECF No. 114-1 ("McMullan
26 Decl.") ¶ 2, Ex. B.

27 After the February 10, 2015 Rule 30(b)(6) deposition,
28 Plaintiffs concluded there was still a need to depose Luntz,

1 seemingly to authenticate certain documents. Id. at ¶ 3. As a
2 result, Plaintiffs continued to seek a stipulation regarding those
3 documents, but, with the fact discovery deadline looming, the clock
4 ran out. As a result, Plaintiffs filed this motion.

5 Scheduling orders "may be modified only for good cause and
6 with the judge's consent." Fed. R. Civ. P. 16(b)(4). Pretrial
7 scheduling orders may be modified if the dates scheduled "cannot
8 reasonably be met despite the diligence of the party seeking the
9 extension." Johnson v. Mammoth Recreations, Inc., 975 F.2d 604,
10 609 (9th Cir. 1992). The focus of the good cause inquiry is "on
11 the moving party's reasons for seeking modification. If that party
12 was not diligent, the inquiry should end." Id. As the undersigned
13 has previously observed, "centering the good cause analysis on the
14 moving party's diligence prevents parties from profiting from
15 carelessness, unreasonability, or gamesmanship, while also not
16 punishing parties for circumstances outside their control." In re
17 Cathode Ray Tube (CRT) Antitrust Litig., No. C-07-5944-SC, 2014 WL
18 4954634, at *2 (N.D. Cal. Oct. 1, 2014) (citing Orozco v. Midland
19 Credit Mgmt. Inc., No. 2:12-cv-02585-KJM-CKD, 2013 WL 3941318, at
20 *3 (E.D. Cal. July 30, 2013)).

21 Civil Local Rule 6-3 also sets forth specific requirements for
22 motions to change time. Specifically, the moving party must file
23 three documents: (1) a motion of no more than five pages, (2) a
24 proposed order, and (3) a declaration. Civ. L.R. 6-3(a). The
25 accompanying declaration must set forth "with particularity" the
26 reasons for the enlargement of time, the efforts to obtain a
27 stipulated time change, "the substantial harm or prejudice that
28 would occur if the Court did not change the time," any prior time

1 modifications in the case, and the effect of the modification on
2 the schedule for the case. Civ. L.R. 6-3(a)(1)-(6).

3 Plaintiffs' motion must be denied for two separate (but each
4 individually sufficient) reasons. First, Plaintiffs' motion does
5 not comply with Civil Local Rule 6-3(a) and 6-3(a)(3) because it
6 was not accompanied by the required declaration and does not
7 sufficiently set forth a "substantial harm or prejudice" that would
8 result from the denial of the motion. Second, even if Plaintiffs
9 had filed the necessary declaration and demonstrated prejudice,
10 they did not act diligently in pursuing the discovery at issue.

11 First, contrary to the requirement of Civil Local Rule 6-3(a),
12 Plaintiffs did not file a declaration with their motion.
13 Plaintiffs did, however, file a declaration with their unauthorized
14 reply brief "[p]ursuant to Local Rule 6-3" McMullan Decl.
15 at 1. But this declaration does not comply with the requirements
16 of Civil Local Rule 6-3. Specifically, Plaintiffs' belated
17 declaration does not set forth "the substantial harm or prejudice"
18 that Plaintiffs will suffer if the Court does not extend the
19 deadline. Civ. L.R. 6-3(a)(3). Obviously, if the Court denies the
20 motion Plaintiffs will be unable to depose the Luntz witnesses, but
21 Plaintiffs have not provided any explanation at all of how (if at
22 all) that will prejudice their case. Nor do they provide any
23 explanation of why the Rule 30(b)(6) deposition that took place on
24 February 10, 2015 was not sufficient aside from their conclusory
25 assertion that it "did not, in Plaintiffs' view, eliminate the need
26 to depose Luntz." Reply at 2-3; McMullan Decl. ¶ 3. Maybe
27 Plaintiffs would argue they will be prejudiced if they are unable
28 to depose the Luntz witnesses because they might be unable to use

1 the non-authenticated documents produced by Luntz in support of
2 their forthcoming class certification motion. But Plaintiffs state
3 that Luntz only produced 37 documents anyway. Perhaps those are
4 very important documents, but Plaintiffs do not say so, and in any
5 event the Court should not have to guess or read between the lines
6 of Plaintiffs' briefs and declaration to suss out the prejudice
7 they might suffer. But that is the only option Plaintiffs left the
8 Court when they failed to mention prejudice at all in their opening
9 brief and failed to discuss prejudice outside of rebutting Frito-
10 Lay's claims of prejudice in their unauthorized reply. This is
11 insufficient, and would be enough standing alone to deny
12 Plaintiffs' motion.

13 But there is a second, and even more compelling, reason to
14 deny Plaintiffs motion: Plaintiffs have not demonstrated that they
15 diligently pursued the discovery at issue. As Defendants' brief
16 and declaration makes clear, Plaintiffs were aware that the Luntz
17 witnesses might have discoverable information since July and
18 actually obtained document discovery from them in September. But
19 Plaintiffs offer nothing in their submissions explaining why they
20 waited almost four months after receiving that discovery (until the
21 eve of the fact-discovery cutoff) to notice and schedule the
22 deposition of the Luntz witnesses. Without some explanation for
23 that delay or any indication of factors outside Plaintiffs'
24 control, the Court cannot conclude Plaintiffs diligently pursued
25 this discovery. See Mitsui O.S.K. Lines, Ltd. v. Seamaster
26 Logistics, Inc., No. 11-cv-2861, 2012 WL 6095089, at *2-3 (N.D.
27 Cal. Dec. 7, 2012) ("Plaintiff provided no explanation for why it
28 waited, at minimum, nearly two full months . . . despite its

1 knowledge that the discovery cutoff in this action loomed . . .
2 ."). In any event, absent some circumstance outside Plaintiffs'
3 control, it was unreasonable for Plaintiffs to wait, with full
4 notice of the existence of relevant witnesses, until less than a
5 month prior to the fact discovery cutoff to notice a third party
6 deposition. Plaintiffs do not argue otherwise, and instead begin
7 their discussion of diligence at the time they noticed the
8 deposition. That is insufficient to show Plaintiffs' diligence,
9 and as a result, "the inquiry should end." See Johnson, 975 F.2d
10 at 609.

11 For these reasons the Court finds Plaintiffs have not
12 demonstrated good cause to extend the discovery deadline as
13 required by Federal Rule of Civil Procedure 16(b)(4). Accordingly
14 the motion is DENIED.

15
16 Dated: February 25, 2015



UNITED STATES DISTRICT JUDGE